(1) Supreme Court, U.S.
FILED

Case No. 95-866 NOV 14 1995

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1995

John J. Gosbee,

Petitioner,

vs.

Resolution Trust Corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH DAKOTA

John J. Gosbee
Petitioner and
Counsel for Petitioner

103 3rd Avenue, N.W.
Mandan, ND 58554-3129
(701) 663-2225

BEST AVAILABLE COPY

35 pp

QUESTIONS PRESENTED FOR REVIEW

No. 1:

Does a state Supreme Court have the authority to alter the time allowed by this Court's rules to file a petition for writ of certiorari?

No. 2:

Does the borrower, in a mortgage foreclosure case, have a due process right to consistent application by a state Supreme Court of that court's procedural rules? Specifically, having concluded that neither of two potential foreclosure defenses was properly preserved at the trial court level, may that Supreme Court reach the merits of one defense, while declining to reach the merits of the other and likely more successful defense?

No. 3:

Is a borrower denied equal protection of the laws when the state Supreme Court overlooks the lender's failure to file a reply to a counterclaim for more than double the time allowed under the rules of that court?

LIST OF PARTIES

Omitted because all names appear in the caption of the case.

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REFERENCE TO OFFICIAL REPORTS

The decision of the North Dakota Supreme Court is reported at *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698 (N.D. 1995).

GROUNDS FOR THIS COURT'S JURISDICTION

(i) The mandate of the North Dakota Supreme Court was issued on August 31, 1995. The order conditioning Petitioner's motion to stay the mandate was entered on October 18, 1995.

(ii) The petition for rehearing was denied by the North Dakota Supreme Court on September 26, 1995.

(iii) Does not apply.

(iv) Jurisdiction of this Court is conferred by 28 U.S.C., section 1251(a), specifically, the denial of petitioner's rights to due process under the United States Constitution.

North Dakota's confiscatory price defense:

North Dakota Century Code, sections 28-29-04, 28-29-05 (reproduced in Appendix).

North Dakota's intervening superhuman cause defense: North Dakota Century Code, section 9-11-04 (reproduced in Appendix).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment XIV, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive

any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1982, the Petitioner, John J. Gosbee (Borrower), bought a home, giving a mortgage to Midwest Federal Savings and Loan (Midwest) in Minot, North Dakota. Borrower's home is located in rural Mandan, North Dakota, about 18 miles west of the state capitol in Bismarck.

Midwest eventually folded and was taken over by the Respondent, Resolution Trust Corporation (Lender). In September 1993, Lender sued Borrower, claiming Borrower had not made payments on the mortgage, and seeking foreclosure of the mortgage.

On October 21, 1993, Borrower served a

timely Answer and Counterclaim. The Answer raised a number of defenses, including North Dakota's confiscatory price defense (CPD) and North Dakota's intervening superhuman cause defense (ISCD), either of which would have been sufficient to survive a summary judgment motion. The Counterclaim asserted torts committed by Borrower or its agents.

After Lender's time to file a Reply to Counterclaim had lapsed, on November 29, 1993, Borrower filed an Application for Default Judgment. Lender finally filed its Reply to Counterclaim on December 9, 1993, some 23 days late.

On April 4, 1994, Lender filed a motion for summary judgment. Lender's pleadings on its summary judgment motion did not address any factual issues involved CPD or ISCD. Borrower's pleadings

reasserted CPD and ISCD. However, because Lender had not included any affidavits or other factual material relating to CPD or ISCD, Borrower did not include affidavits relating to those defenses, believing those defenses would be decided on the pleadings.

On June 8, 1994, the trial court entered an order granting judgment to Lender (Appx., pp. 1-2). Borrower filed a timely appeal to the North Dakota Supreme Court.

In *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698 (N.D. 1995), the North Dakota Supreme Court ruled that, because Borrower had not submitted any affidavits addressing CPD or ISCD, he had not properly preserved either defense. Nonetheless, the North Dakota Supreme Court reached the merits of ISCD, concluding that it could not apply to Borrower. However, the North

Dakota Supreme Court declined to reach CPD, citing the procedural deficiencies alluded to.

The North Dakota Supreme Court also ruled that it was not improper for Lender to wait until 23 days after the deadline for filing a Reply to Counterclaim before doing so.

Borrower filed a timely Petition for Rehearing with the North Dakota Supreme Court, raising the constitutional issue of that court's inconsistent application of its own rules and denial of equal protection of the laws to Borrower.

On September 26, 1995, the North Dakota Supreme Court entered an order denying Borrower's petition for rehearing. This order was not served on Borrower, although he was advised of its contents by letter from the clerk. Appx., pp. 3-4. By

operation of Supreme Court Rules 13.1, 13.4, and 30.1, the time for filing a Petition for Writ of Certiorari began on September 26, 1995, and did not expire until at least December 26, 1995.

On October 5, 1995, Borrower filed a motion with the North Dakota Supreme Court, asking for a stay of that court's mandate pending filing a Petition for Writ of Certiorari with this Court. The North Dakota Supreme Court granted that motion, but conditioned it on Borrower's paying an additional $2,000 cash bond and filing his Petition for Writ of Certiorari before 9:00 A.M., CST, November 8, 1995. Appx., pp. 5-6; 7-8.

Because the North Dakota Supreme Court's decisions have denied Borrower equal protection of the laws of North Dakota, Borrower petitions this Court for a Writ of Certiorari to the North Dakota Supreme Court.

ARGUMENT

I. A STATE COURT HAS NO AUTHORITY TO CHANGE THIS COURT'S RULES

Because this is a mortgage foreclosure case, stay of the mandate of the North Dakota Supreme Court is critical to Borrower's ability to assert his rights. If a stay were not issued, the property would be sold long before this Court could reach a decision on a petition for a Writ of Certiorari, let alone reach a decision on the merits.

Borrower sought a stay from the North Dakota Supreme Court. On October 18, 1995, that court stayed the mandate, but conditioned the stay on Borrower filing his petition for certiorari with this Court by November 8, 1995. Appx., pp. 5-6) By letter, the clerk of the North Dakota Supreme Court apprised Borrower that proof of service of the Petition for Writ of

Certiorari was to be filed in the clerk's office by 9:00 A.M., Wednesday, November 8, 1995. Appx., pp. 7-8.

Under the Constitution of the United States, the judicial power of the United States is placed in this Court and in inferior courts established by Congress. U.S. Const., Art. I, s. 1. This Court has power to adopt rules for its procedures. 28 U.S.C. s. 2071(a). The North Dakota Supreme Court has no authority to change the rules of this Court. Rather, because those rules are the supreme law of the land with respect to procedures in this Court, the North Dakota Supreme Court is bound by them. U.S. Const., Art. VI, cl. 2.

Under this Court's rules, Borrower had 90 days after the denial of the petition for rehearing to file a petition for certiorari. Supreme Court Rule 13.1. The mandate of the North Dakota Supreme Court

was issued on September 26, 1995. Appx., pp. 3-4.

Thus, Borrower should have had until December 26, 1995, to file a petition for certiorari. The action of the North Dakota Supreme Court had the effect of shortening that time to 42 days.

Therefore, even if Borrower's petition for certiorari is not granted, Borrower asks that this Court order the North Dakota Supreme Court defer entry of its mandate until Borrower has had the benefit of the full 90 days he should have been allowed under Supreme Court Rule 13.1.

II. BORROWER IS ENTITLED, AS AN ELEMENT OF EQUAL PROTECTION, TO CONSISTENT APPLICATION OF STATE PROCEDURAL RULES

Borrower asserted two defenses in his foreclosure case that are relevant to this petition. North Dakota recognizes, inter

alia, the confiscatory price defense (NDCC ss. 28-29-04, 28-29-05; Appx., pp. 10-12) (CPD) and the irresistible superhuman cause defense (NDCC s. 9-11-04(2); Appx., p. 9) (ISCD).

On appeal, the North Dakota Supreme Court declined to address the CPD, stating:

> Regardless of whether this defense [*i.e.*, CPD] is available to persons who are not engaged in farming, *[Borrower's] conclusory allegations are insufficient to raise a genuine issue of material fact on the confiscatory price defense.*
>
> *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698, 701 (N.D. 1995), emphasis added.

Thus, the North Dakota Supreme Court declined to reach the merits of CPD because of Borrower's failure to raise a genuine issue of material fact.

In contrast, despite an identical procedural deficiency, recognized as identical by the North Dakota Supreme

Court, that court reached the merits of the ISCD:

> [Borrower's] affidavit did not address this defense [*i.e.*, ISHCD], *and he again relied on his pleadings* . . . . "Temporary economic adversity" is not an act of God amounting to an irresistible superhuman cause [citation omitted].
>
> *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698, 701-02 (N.D. 1995), emphasis added.

Whatever may be said about Borrower's failure to preserve the issue of the confiscatory price defense, he was equally deficient in preserving the irresistible superhuman cause defense. Yet the North Dakota Supreme Court reached the merits of one defense but not the other.

Under the Constitution, states are prohibited from denying any person equal protection of the laws. U.S. Const., Amdt. XIV, s. 1. That provision has led this Court to stress the importance of the appearance of fair play in judicial

proceedings:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the *two central concerns of procedural due process,* the prevention of unjust or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. [citation omitted] The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. [citation omitted] *At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done,"* [citation omitted] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
>
> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), emphasis added.

It is difficult to imagine how the feeling that justice has been done can be promoted

by an appellate decision that cites a procedural deficiency to decline to rule on an issue that Borrower has some chance of prevailing on, only to have that deficiency overlooked on an issue decided against Borrower. Therefore, Borrower asks that this Court grant certiorari for the purpose of determining whether equal protection and due process are violated by such an inconsistent application of state procedural rules.

III. A PARTY HAS A DUE PROCESS AND EQUAL PROTECTION RIGHT TO HAVE A STATE COURT FOLLOW ITS OWN RULES

It is undisputed that Lender did not file a timely reply to Borrower's Counterclaim. Rather, Lender filed its reply some 43 days after service of the Counterclaim, and some 23 days after a reply was required.

This argument was given short shrift

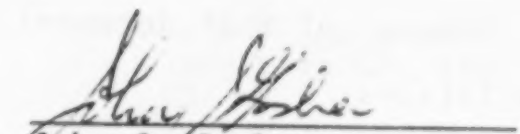
by the North Dakota Supreme Court:

> [Borrower] asserts the trial court erred in denying his motion for default judgment against [Lender] because [Lender] did not reply to the counterclaim within 20 days. However, [Lender] did file a reply to the counterclaim five days before the scheduled hearing on the motion for default judgment. The trial court did not abuse its discretion in allowing the late filing and denying the motion for default judgment.
>
> *Resolution Trust Corp. v. Gosbee*, 536 N.W.2d 698, 702 (N.D. 1995), emphasis added.

The North Dakota Supreme Court gave no reason for its decision to ignore one of its own rules. For the reasons stated in the quotation from *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 240, Borrower believes that the appearance and reality of fairness is not preserved by an appellate decision that ignores the appellate court's own rules without providing some explanation for why the rules shouldn't apply. The essence of equal protection is that we are

all equal before the law. That protection is denied when application of procedural rules is left to judicial will, rather than judicial reason. Therefore, Borrower's petition for certiorari should be granted.

Dated November 8, 1995.



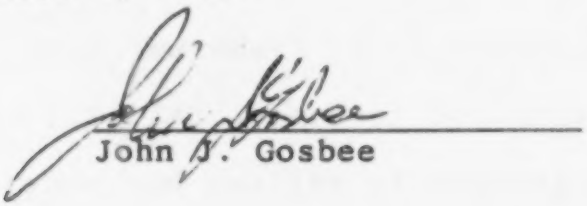
John J. Gosbee
Petitioner
103 3rd Avenue, N.W.
Mandan, ND 58554
(701) 663-2225

CERTIFICATE OF SERVICE

In accordance with Supreme Court Rule 29.3, as a pro se litigant and as a member of the Bar of this Court, I certify that I have served a copy of the Petition for Writ of Certiorari on the Respondent by mailing 3 copies of that document to its attorney, as follows:

John J. Petrik, Esq.
Pringle & Herigstad
P.O. Box 1000
Minot, ND 58702-1000
(701) 857-1361

Dated November 8, 1995.



John J. Gosbee

0301 73

APPENDIX

Trial Court Order, June 7, 1994:

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MORTON

Resolution Trust Corporation as Receiver for Midwest Federal Savings Bank of Minot,	)	
Plaintiff,	)	ORDER
vs.	)	Case No. 93-C-17186
John J. Gosbee,	)	
Defendant.	)	

Plaintiff has moved for summary judgment. Defendant resists.

After review of all the files and records in this case and after reflection upon the arguments of counsel, I am left with the firm impression that there is a conspicuous absence of any material fact in dispute entitling Plaintiff to summary judgment.

Defendant/Counterclaimant's counterclaim is dismissed without prejudice

pending exhaustion of administrative remedies.

Let judgment be entered accordingly.

Dated this 7th day of June, 1994.

BY THE COURT:
/s/ Ronald L. Hilden
RONALD L. HILDEN
MORTON COUNTY DISTRICT
JUDGE BY ASSIGNMENT

(SEAL)

[Certificate of Mailing]

Correspondence from Clerk of the North Dakota Supreme Court, September 26, 1995:

Supreme Court of North Dakota

OFFICE OF THE CLERK
Judicial Wing, First Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0530
(701) 328-2221 (voice)
(701) 328-2884 (TDD)

CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

September 26, 1995

Mr. John J. Gosbee
Attorney at Law
103 3rd Avenue, N.W.
Mandan, ND 58554-3129

RE: Resolution Trust Corp. v. Gosbee
Supreme Court No. 940264

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the clerk of the trial court

after the expiration of seven days.

Sincerely yours,

/s/ Penny Miller

Penny Miller
Clerk
North Dakota
Supreme Court

PM

pc: Mr. John J. Petrik
The Honorable Ronald L. Hilden

Order of the North Dakota Supreme Court, October 18, 1995:

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 940264

Resolution Trust Corporation, as Receiver for Midwest Federal Savings Bank of Minot, Plaintiff and Appellee

v.

John J. Gosbee, Defendant and Appellant

On October 5, 1995, a Motion to Stay Mandate Under Rule 41(b), NDRAppP, was filed by Appellant John J. Gosbee. Thereafter, on October 16, 1995, a Reply to the Motion was filed by counsel for Appellee. The Court considered the matter, and

ORDERED, that the granting of the stay of mandate is conditioned upon Mr. Gosbee filing within 20 days from the date of this Order an additional $2,000 cash bond with the Clerk of the Morton County District

Court and the Petition for Writ of Certiorari to the United States Supreme Court with the Clerk of the United States Supreme Court.

The Supreme Court of the State of North Dakota convened at 9 a.m. this 18th day of October, 1995, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Beryl J. Levine, the Honorable William A. Neumann, the Honorable Dale V. Sandstrom, Justices, directing the Clerk of the Supreme Court to enter the above order. The Honorable Herbert L. Meschke, deeming himself disqualified, did not participate.

/s/ Penny Miller

Penny Miller

Clerk

North Dakota Supreme Court

Correspondence from Clerk of the North Dakota Supreme Court, October 18, 1995:

Supreme Court of North Dakota

OFFICE OF THE CLERK
Judicial Wing, First Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0530
(701) 328-2221 (voice)
(701) 328-2884 (TDD)

CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

October 18, 1995

Mr. John J. Gosbee
Attorney at Law
103 3rd Avenue, N.W.
Mandan, ND 58554-3129

RE: Resolution Trust Corp. v. Gosbee
Supreme Court No. 940264
District Court No. 93-C-17186

Enclosed is a copy of an Order entered today by the Supreme Court in the above case.

In light of the Court's action, if proof of filing the additional cash bond and the Petition for Writ of Certiorari are

not received in my office by 9 **a.m.**, **Wednesday, November 8, 1995,** the mandate will be immediately issued.

Sincerely yours,

/s/ Penny Miller

Penny Miller
Clerk
North Dakota
Supreme Court

PM:ls
Enclosure

pc & encl.: Mr. John J. Petrik
Ms. Kathy Marshall, Clerk of Court
The Honorable Ronald L. Hilden
The Honorable Gerald L. VandeWalle

[Note: Bold-faced emphasis in original.]

North Dakota Century Code, Section 9-11-04, subsection 2:

9-11-04. Want of performance or offer -- When excused. The want of performance of an obligation or an offer of performance, in whole or in part, or any delay therein, is excused by the following causes to the extent to which they operate:

1. * * * .

2. When it is prevented or delayed by an irresistible superhuman cause or by the act of public enemies of the this state or of the United States, unless the parties have agreed expressly to the contrary; or

3. * * * .

North Dakota Century Code, Section 28-29-04:

28-29-04. Power of courts when prices are confiscatory. Until the price of farm products produced in this state rises to a point to equal at least the cost of production, in comparison with the price of other commodities in general, entering into the business of agriculture, the supreme court of this state and all district courts in this state have power, when it is deemed for the best interests of litigants, to extend the time for serving and filing all papers requisite and necessary for the final determination of any cause. Any such court, in like manner, may stay the entry of judgment or the issuance of execution thereon, or may defer the signing of any order for judgment, or may defer terms of court, whenever in the judgment of the

court the strictly legal procedure in any cause will confiscate or tend to confiscate the property of any litigant by forcing the sale of agricultural products upon a ruinous market.

North Dakota Century Code, Section 28-29-05:

28-29-05. Courts may delay orders in foreclosures. Whenever any foreclosure proceeding is pending in any court in this state and the amount of the debt is less than the value of the property involved, and when any order for judgment will have the force and effect of depriving a defendant of his home and confiscating his property, the court may construe further proceedings to be unconscionable, and may delay the signing of such order to such time as it shall deem it advisable and just to enter the same.

Supreme Court, U.S.
FILED

95-866 NOV 14 1995

OFFICE OF THE CLERK

Case No.

SUPREME COURT OF THE UNITED STATES

October Term 1995

John J. Gosbee,

Petitioner,

vs.

Resolution Trust Corporation,

Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

John J. Gosbee
Petitioner and
Counsel for Petitioner

103 3rd Avenue, N.W.
Mandan, ND 58554-3129
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SUPPLEMENTAL APPENDIX

Published opinion of the North Dakota Supreme Court, August 31, 1995:

[536 N.W.2d 698]:

Resolution Trust Corporation, as Receiver for Midwest Federal Savings Bank of Minot, Plaintiff and Appellee

v.

John J. Gosbee, Defendant and Appellant

Civ. No. 940264

Supreme Court of North Dakota

Aug. 31, 1995

[536 N.W.2d 699]:

NEUMANN, Justice.

John Gosbee appeals from a summary judgment foreclosing a mortgage held by Resolution Trust Corporation (RTC) on his

[536 N.W.2d 700]:

property and dismissing without prejudice Gosbee's counterclaim against RTC. We

affirm.

In December 1982, Midwest Federal Savings and Loan Association of Minot loaned Gosbee $45,500. Gosbee executed a promissory note and gave the bank a mortgage on his Morton County property to secure the debt. When the bank failed in 1990, RTC was appointed its receiver.

In 1993, the amount due each month under the note and mortgage was approximately $507. Gosbee made the January 1, 1993 payment. In March 1993, after Gosbee failed to make the February and March payments, the servicer for RTC sent Gosbee a letter stating he was $1,054.65 in arrears. Two months later, on May 4, 1993, Gosbee tendered a $1,014 check to the servicer for the February and March payments. The servicer rejected the check, stating the amount now due was $2,083.98. Gosbee made no further attempt to bring the

payments current. RTC then commenced this foreclosure action and moved for summary judgment. The trial court granted the motion, and Gosbee appealed.

Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the party opposing the motion, there are no genuine issues of material fact or conflicting inferences that can be reasonably drawn from undisputed facts, or if the only issues to be resolved are questions of law. Roen Land Trust v. Frederick, 530 N.W.2d 355, 257 (N.D. 1995). Under N.D.R.Civ.P. 56, if the movant meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the

existence of a genuine issue of material fact. *Hummel v. Mid Dakota Clinic*, 526 N.W.2d 704, 707 (N.D. 1995).

RTC presented an affidavit showing Gosbee defaulted under the terms of the note and mortgage and the amount he owed on the debt. Gosbee responded with an affidavit containing general allegations of factual disputes. Gosbee acknowledged receiving payment records and loan activities codes from RTC to assist in interpreting those records. Gosbee complained that he "still cannot determine what the charges are," and set forth some examples. He claimed "I do not know what the charges described ... are for and I do not believe I ever authorized their being made against my account." Gosbee further stated "I cannot tell for sure from the information provided" what RTC used in making the computations. RTC responded

with another affidavit stating that it would be willing to concede an alleged $13 overcharge, plus four years' interest at 10% "in order to try and bring this matter to summary judgment." RTC also reduced the amount owed by $50 to resolve the issue.

Gosbee did not engage in discovery to get an explanation of the charges he questioned. Nor did Gosbee seek further time for discovery under N.D.R.Civ.P. 56(f). *See Hummel*, 526 N.W.2d at 708. Gosbee's allegations of misunderstanding and inability to decipher the charges are insufficient to raise a genuine issue of material fact. His attempt to create a factual issue by doing his own computations in his appellate brief and claiming "the judgment was inexplicably $275.54 higher than it should have been" comes too late. The trial court did not err in granting summary judgment on this issue.

Gosbee asserts that, by rejecting his attempted tender of $1,014 for two months of payments in May 1993, RTC forfeited any entitlement to that amount or, at the very least, RTC is not entitled to interest on the amount by which the principal balance would have been reduced if it had accepted the payment. Gosbee primarily relies on N.D.C.C. §9-11-05, which provides, "[i]f the performance of an obligation is prevented by the creditor, the debtor is entitled to all the benefits he would have obtained if it had been performed by both parties." He also relies on N.D.C.C. §32-03-04, which allows a person to recover interest on damages, "except for such time as the debtor is prevented by law or by the act of the creditor from paying the debt," and on N.D.C.C. §9-11-04(1), which excuses the want of per-

[536 N.W.2d 701]:

formance of an obligation "[w]hen such performance or offer is prevented or delayed by the act of the creditor or by the operation of law, even though there may have been a stipulation that this may not be an excuse."

Gosbee did not tender the February and March 1993 payments to RTC until May 4, 1993. By that time, the April and May 1993 payments were also delinquent. The tendered payment did not bring the loan current. Gosbee therefore did not tender the performance of his obligation, but only tendered partial performance. While an obligation is extinguished by an offer of performance intended to extinguish the obligation, an "offer of partial performance ... is of no effect." N.D.C.C. §9-12-08. Because Gosbee tendered only partial performance, he was not released

from any obligation to pay interest on the debt. *See Kuhn v. Hamilton*, 138 N.W.2d 604 (N.D. 1965). *Compare Swallow v. First State Bank*, 35 N.D. 608, 161 N.W. 207 (1917) (tender and deposit of full amount due on note secured by mortgages extinguished obligation); *Rose v. Hecht*, 94 Cal.App.2d 662, 211 P.2d 347 (1949) (assignees of lease were relieved of interest charges on rentals where landlord refused to accept timely tenders of correct installments of rent).

Gosbee asserts RTC violated N.D.C.C. §32-19-21(3), which requires that a notice before foreclosure contain "[t]he amount due for principal, interest, and taxes paid by the owner of the mortgage, stated separately." Although the notice before foreclosure in this case listed separately the principal and interest due, an amount designated only as delinquent "escrow" was

the third listed item. The mortgage required establishment of an escrow fund in which monthly payments of one-twelfth yearly taxes and yearly premium installments for hazard insurance were deposited. Because the delinquent escrow amount was not divided into a separate amount for insurance premiums and a separate amount for taxes, Gosbee asserts the notice before foreclosure is invalid. We disagree.

The statute requires a statement of taxes paid by the mortgagee only when these taxes actually have been paid by the mortgagee. *Norwest Bank North Dakota v. Frederick*, 452 N.W.2d 316, 318 (N.D. 1990). Under the type of escrow agreement in this case, the mortgagor is viewed as the payor of taxes and insurance. *See Dakota Bank and Trust v. Funfar*, 443 N.W.2d 289, 292 (N.D. 1989). A statement of

delinquent monthly escrow charges does not necessarily imply that the mortgagee has actually paid taxes through the use of its own funds. Indeed, Gosbee does not appear to assert that RTC has paid, through the use of its own funds, any amount for taxes on the property that would have been required to be listed on the notice before foreclosure. Gosbee has failed to raise an inference that the notice before foreclosure is invalid.

Gosbee asserts the trial court erred in granting summary judgment dismissal of his confiscatory price defense. *See* N.D.C.C. Chapter 28-29. Gosbee's affidavit did not address the issue. Instead, he relied only on his allegations in his answer:

> "A material portion of the borrower's earnings derives from clients who are farmers or who are dependent on the

agricultural economy. On information and belief, the price of farm products produced in this state does not exceed the cost of production."

Regardless of whether this defense is available to persons who are not engaged in farming, Gosbee's conclusory allegations are insufficient to raise a genuine issue of material fact on the confiscatory price defense. *See Gress v. Kocourek*, 427 N.W.2d 815, 817 (N.D. 1988); *Federal Land Bank of Saint Paul v. Anderson*, 401 N.W.2d 709, 712 (N.D. 1987); *Federal Land Bank of St. Paul v. Bagge*, 394 N.W.2d 694, 696 (N.D. 1986).

Gosbee asserts the trial court erred in granting summary judgment dismissal of his "irresistible superhuman cause" defense under N.D.C.C. §9-11-04(2). Gosbee's affidavit did not address this defense, and he again relied on his pleadings which allege his failure to perform under the

contract should be excused because of "temporary economic adversity." An irresistible superhuman cause is an act of God "which operates without any aid or interference from man." *Clay*

[536 N.W.2d 702]:

County v. Simonsen, 1 Dak. 403, 46 N.W. 592, 596 (1877). "Temporary economic adversity" is not an act of God amounting to an irresistible superhuman cause. *Cf.* 18 Williston on Contracts §1932, at p. 10 (3rd ed. 1978) (Insolvency or inability to obtain necessary funds is an illustration of subjective impossibility which does not excuse nonperformance of a contract).

Gosbee asserts the trial court erred in denying his motion for default judgment on his counterclaim against RTC because RTC did not reply to the counterclaim within 20 days. However, RTC did file a reply to the counterclaim five days before the scheduled

hearing on the motion for default judgment. The trial court did not abuse its discretion in allowing the late filing and denying the motion for default judgment. *See Farmers Elevator of Horace v. Nagel*, 307 N.W.2d 580, 586 (N.D. 1981). Furthermore, the trial court properly dismissed without prejudice Gosbee's counterclaim against the RTC pending exhaustion of administrative remedies under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. §1821(d). *See, e.g., Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 484 (8th Cir. 1993). Because Gosbee's constitutional argument about the FIRREA was not adequately raised in the trial court, we do not address it. *See N.D. Guar. Student Loan Program v. Voigt*, 513 N.W.2d 64, 66 (N.D. 1994).

Gosbee claims the trial court's order

for summary judgment is insufficient because "no clue can be gleaned as to its reasoning." But the trial court succinctly stated its reason for granting RTC's summary judgment motion: "After review of all the files and records in this case and after reflection upon the arguments of counsel, I am left with the firm impression that there is a conspicuous absence of any material fact in dispute... ."

We concur with the trial court's assessment of the case.

The summary judgment is affirmed.

VANDE WALLE, C.J., LEVINE and SANDSTROM, JJ. and WILLIAM W. McCLEES, District Judge, concur.

WILLIAM L. McLEES, District Judge, sitting in place of MESCHKE, J., disqualified.

CERTIFICATE OF SERVICE

In accordance with Supreme Court Rule 29.3, as a pro se litigant and as a member of the Bar of this Court, I certify that I have served a copy of the Supplemental Appendix to the Petition for Writ of Certiorari on the Respondent by mailing 3 copies of that document to its attorney, as follows:

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Dated November 30, 1995.

John J. Gosbee